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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have read this decision more broadly than its precise holding and have concluded that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim—that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

TABLE OF CONTENTS

Page

Question Presented i

Opinion below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 1

Reasons for Granting the Writ 9

I. Most state and federal courts have concluded that there is no constitutional requirement that residual-doubt evidence be admitted in a penalty-phase proceeding. The Oregon Supreme Court's contrary ruling creates a split on this important federal issue 10

a. The narrow holding in *Franklin* is that the constitution does not establish a right to a jury instruction on residual doubt. 10

b. Most states have read *Franklin* more broadly to control the issue presented here and concluded, contrary to the Oregon Supreme Court, that there is no federal constitutional right to admit evidence in support of a residual-doubt argument. 12

c. Some states have concluded that a defendant does not have a constitutional right to raise residual doubt in the penalty phase, although the precise basis for the conclusion is unclear. 15

d. At least one court permits argument about residual doubt, but does not find a federal constitutional right to introduce evidence or have a jury instructed on the issue. 17

e. Some states have found a state-law basis for a residual-doubt claim. 18

f. Only two courts appear to have reached a result similar to that of the Oregon Supreme Court. 19

II. The Oregon Supreme Court's decision provides the Court with an opportunity to clarify whether, under the Eighth Amendment, residual-doubt evidence must be admitted in penalty-phase proceedings. 21

Conclusion 22

Appendix bound under separate cover

TABLE OF AUTHORITIES

Page

Cases Cited

Bell v. Ohio,
438 U.S. 637 (1978) 6

Blankenship v. State,
251 Ga. 621, 308 S.E.2d 369 (1983) 19

Blue v. State,
125 S.W.3d 491 (Tex. 2003),
cert. denied sub nom Blue v. Texas,
___ U.S. ___, 125 S. Ct. 297,
160 L. Ed. 2d 87 (2004)..... 15

Commonwealth v. Fisher,
572 Pa. 105, 813 A.2d 761 (2002)..... 16

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 3

Darling v. State,
808 So. 2d 145 (Fla. 2002),
cert. denied sub nom Darling v. Florida,
537 U.S. 848 (2002) 13

Duest v. State,
855 S. 2d 33 (Fla. 2003),
cert. denied sub nom Duest v. Florida,
___ U.S. ___, 158 L. Ed 2d 500,
124 S. Ct. 2023 (2004)..... 12

Eddings v. Oklahoma,
455 U.S. 104 (1982) 6, 19, 20

Evans v. Thompson,
881 F.2d 117, 121 (1989),
cert. denied 497 U.S. 1010 (1990) 17

Franklin v. Lynaugh,
487 U.S. 164 (1988) 8-18, 20-22

Gollehon v. State,
296 Mont. 6, 986 P.2d 395 (1999),
cert. denied sub nom Gollehon v. Montana,
529 U.S. 1041 (2000) 15

Green v. Georgia,
442 U.S. 95 (1979) 7, 8, 14

Height v. State,
___ Ga. ___, ___ S.E.2d ___, 2004
Ga. LEXIS 958 (Nov 8, 2004)..... 19

Holland v. Mississippi,
705 So. 2d 307 (Miss. 1997),
cert. denied 525 U.S. 829 (1998) 17, 18

In re Lord,
123 Wn. 2d 296, 868 P.2d 835 (1994),
cert. denied sub nom Lord v. Washington,
513 U.S. 849 (1994) 16

Lockett v. Ohio,
438 U.S. 586 (1978) 6, 7, 19, 20

Marks v. United States,
430 U.S. 188 (1977) 11

Melson v. State,
775 So. 2d 857 (Ala. 1999) 14

Payne v. Tennessee,
501 U.S. 808,
reh'g den., 501 U.S. 1277 (1991)..... 2

Penry v. Lynaugh,
492 US 302 (1989) 2, 12

People v. Emerson,
189 Ill. 2d 436, 727 N.E.2d 302 (2000),
cert. denied sub nom Emerson v. Illinois,
531 U.S. 930 (2000) 13

People v. Kirchner,
194 Ill. 2d 502, 743 N.E.2d 94 (2000),
cert. denied sub nom Kirchner v. Illinois,
533 U.S. 955 (2001) 13

People v. Musselwhite,
17 Cal. 4th 1216, 74 Cal. Rptr. 2d 212 (1998),
cert. denied sub nom Musselwhite v. California,
525 U.S. 1073 (1999) 18

People v. Terrell,
185 Ill. 2d 467, 708 N.E.2d 309 (1998),
cert. denied sub nom Terrell v. Illinois,
528 U.S. 881 (1999) 13

Romine v. State,
256 Ga. 521, 350 S.E.2d 446 (1986),
cert. denied sub nom Romine v. Georgia,
481 U.S. 1024 (1987) 19

Shelton v. State,
744 A.2d 465 (1999),
cert. denied sub nom Shelton v. Delaware,
530 U.S. 1218 (2000) 14

Smith v. Black,
904 F.2d 950 (5th Cir. 1990),
cert. granted and judgment vacated on other grounds,
503 U.S. 930 (1992) 20

State v. Biegenwald,
106 N.J. 13, 524 A.2d 130 (1987) 16

State v. Fletcher,
354 N.C. 455, 555 S.E.2d 534 (2001),
cert. denied sub nom Fletcher v. North Carolina,
537 U.S. 846 (2002) 14

State v. Guzek,
310 Or. 299, 797 P.2d 1031 (1990) 2

State v. Guzek,
322 Or. 245, 906 P.2d 272 (1995) 2

State v. Guzek,
336 Or. 424, 86 P.3d 1106 (2004) 3, 6, 7, 8, 9

State v. Hartman,
42 S.W.3d 44 (Tenn. 2001) 19

State v. Holton,
126 S.W.3d 845 (2004),
cert. denied sub nom Holton v. Tennessee,
___ U.S. ___, 125 S. Ct. 62,
160 L. Ed. 2d 22 (2004).... 18

State v. Josephs,
174 N.J. 44, 803 A.2d 1074 (2002) 16

State v. McDonnell,
329 Or. 375, 987 P.2d 486 (1999) 3

State v. McGuire,
80 Ohio St. 3d 390, 686 N.E.2d 1112 (1997),
cert. denied sub nom McGuire v. Ohio,
525 U.S. 831 (1998) 14, 22

State v. Southerland,
316 S.C. 377, 447 S.E.2d 862 (1994),
cert. denied sub nom Southerland v. South Carolina,
513 U.S. 1166 (1995),
overruled on other grounds,
State v. Chapman,
317 S.C. 302, 454 S.E.2d 317 (1995) 20

State v. Stewart,
288 S.C. 232, 341 S.E.2d 789 (1986) 20

State v. Wille,
317 Or. 487, 858 P.2d 128 (1993) 2

Stockton v. Commonwealth,
241 Va. 192, 402 S.E.2d 196 (1991),
cert. denied sub nom Stockton v. Virginia,
502 U.S. 902 (1991) 14

Zeigler v. Florida,
345 F.3d 1300 (2003),
cert. denied sub nom Zeigler v. Crosby,
___ U.S. ___, 125 S. Ct. 280, 160 L. Ed. 2d 67 (2004)
..... 17

Constitutional and Statutory Provisions

28 U.S.C. § 1257(a) 1

Former Or. Rev. Stat. § 163.150(5)(a)(A) 2

Former Or. Rev. Stat. § 163.150(5)(a)(B) 2

Or. Rev. Stat. § 163.150(1)(b)(D) 5
U.S. Const. amend. VIII 1, 2, 5, 6, 8, 9, 11, 16, 18, 20, 21
U.S. Const. amend. XIV 1

PETITION FOR WRIT OF CERTIORARI

Petitioner State of Oregon respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court in this case.

OPINION BELOW

The opinion of the Oregon Supreme Court (Pet. App. 1-72) is reported at 336 Or. 424, 86 P.3d 1106 (2004). The order of the Oregon Supreme Court denying reconsideration (Pet. App. 87) is not reported.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(a). The Oregon Supreme Court order denying reconsideration was dated and filed on September 8, 2004. This petition is filed within the time granted by the extension of time allowed by Justice O'Connor on November 26, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This capital case came before the Oregon Supreme Court on automatic and direct review of a judgment that imposed a sentence of death for aggravated murder. The

Oregon Supreme Court previously affirmed defendant's conviction of two counts of aggravated murder, *State v. Guzek*, 310 Or. 299, 304, 797 P.2d 1031 (1990) (*Guzek I*), but twice vacated his sentence of death and remanded for further penalty-phase proceedings.[1]

The State conceded that error in this third penalty-phase proceeding once again required a reversal and remand for another penalty phase proceeding.[2] The Oregon

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[1] In defendant's first appeal, the Oregon Supreme Court reversed the penalty phase in light of this Court's holding in *Penry v. Lynaugh*, 492 US 302 (1989) that a penalty-phase jury must consider and answer a general mitigation question under the Eighth Amendment. *Guzek I*, 310 Or. at 305-06. In the second penalty-phase proceeding, the trial court admitted victim-impact evidence against defendant, in light of *Payne v. Tennessee*, 501 U.S. 808, *reh'g den.*, 501 U.S. 1277 (1991). On review, the Oregon Supreme Court agreed with defendant that the victim-impact evidence was not relevant to any of the questions that the jury was required to consider under the applicable state statutory scheme. The court again remanded the case for further penalty-phase proceedings. *State v. Guzek*, 322 Or. 245, 270, 906 P.2d 272 (1995) (*Guzek II*).

[2] At the time of the third penalty-phase proceeding, statutes authorized three possible sentences: life imprisonment with the possibility of release or parole ("ordinary life"), life imprisonment without the possibility of release or parole ("true life"), or death. *Former* Or. Rev. Stat. § 163.150(5)(a)(A), (B). The Oregon Supreme Court had ruled that retroactive application of the true-life sentencing option violated the state and federal prohibitions against *ex post facto* laws. *State v. Wille*, 317 Or. 487, 505, 858 P.2d 128 (1993). However, defendant sought to have the jury instructed on the

Supreme Court agreed with the State's concession, vacated defendant's death sentence and remanded for further penalty-phase proceedings. *State v. Guzek*, 336 Or. 424, 430, 86 P.3d 1106 (2004) (*Guzek III*). The court then addressed some of the remaining issues defendant had raised on appeal, which are likely to arise on remand. *Id.* Among those issues was defendant's challenge to the trial court's refusal to permit defendant to introduce certain alibi evidence to show he was not present when the crime occurred.[3]

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true-life sentencing option and waived all *ex post facto* challenges. The trial court denied the motion and did not instruct the jury regarding the true-life option. *State v. Guzek*, 336 Or. 424, 429, 86 P.3d 1106 (2004). After the conclusion of this third penalty-phase proceeding, the Oregon Supreme Court ruled that refusing to instruct a jury about the true-life sentencing option in these circumstances was reversible error. *State v. McDonnell*, 329 Or. 375, 388, 987 P.2d 486 (1999). On appeal, the State conceded that the failure to instruct the jury on the true-life sentencing option required reversal and remand for a fourth penalty-phase proceeding.

[3] Although further proceedings in the lower state courts will need to take place in this case, this Court nevertheless has jurisdiction over this federal issue because it falls within one of the categories described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975):

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ul-

The two victims were murdered at their home in rural Oregon in the early morning hours of June 29, 1987.[4] Defendant sought the admission of (1) the transcript of his grandfather's testimony, admitted during the guilt phase, that defendant had been with him from 9:00 p.m. on June 28 until 2:00 a.m. on June 29, 1987; and (2) the testimony of defendant's mother that defendant had been at her home from shortly after 2:00 a.m. on the morning of June 29, 1987, and that, when she awoke at 4:20 a.m. on the same day, defendant was sleeping on a loveseat at her house. *Id.* at 450. The trial court excluded the alibi evidence, apparently on relevance grounds. Defendant

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timately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

No matter the outcome of the fourth penalty-phase proceeding in this case, the state will be precluded from appealing a trial court decision to admit alibi evidence and permit a residual doubt argument, as now required by the Oregon Supreme Court decision. Unless this Court considers the State's claim at this point, the State will be unable to obtain review of the Oregon Supreme Court's ruling.

[4] The Oregon Supreme Court described the murder as occurring "in the early morning hours of June 28." It would be more accurrate to describe the murder as occurring on June 29. However it is described, there is no disagreement that the evidence defendant sought to admit in the penalty phase would have demonstrated that he could not have been at the scene of the murder at the time of the murder because he was with his grandfather and then at his mother's home.

argued on appeal that the trial court erred in excluding the evidence because it was mitigating evidence relevant to the statutory question "[w]hether the defendant should receive a death sentence."[5] 336 Or. at 450-51.

The Oregon Supreme Court first considered the state legislature's intent in authorizing the admission of mitigating evidence relevant to whether the defendant should receive a death sentence. 336 Or. at 452. The court concluded that "the legislature intended to limit the admission of 'mitigating evidence' in penalty-phase proceedings so as to satisfy the Eighth Amendment." 336 Or. at 456. "Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider." *Id.* (emphasis in original). *See also* 336 Or. at 468 ("what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less.") (Gillette, J., Carson, C.J. concurring in part and dissenting in part). Thus, the court unanimously concluded that the question—whether the alibi evidence in this case was properly excluded—turns on whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires its admission.

The court's members parted ways in resolving that federal constitutional question. A three-judge majority

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[5] Or. Rev. Stat. § 163.150(1)(b)(D) requires the jury to consider, as one of four questions necessary for the imposition of the death penalty, "[w]hether the defendant should receive a death sentence."

concluded that "the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration." 336 Or. at 457. The two dissenting judges viewed the alibi evidence instead as "not related to any mitigating fact that informs the jury's consideration of the severity of the crime." 336 Or. at 479-80.

The disagreement in the Oregon Supreme Court centers on how the judges read this Court's Eighth Amendment case law. Both the majority and dissent take as a starting point this Court's conclusion that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

The majority acknowledged that the alibi evidence in this case differed from the type of evidence this Court has ruled is appropriate mitigating evidence. In both *Lockett* and the companion case, *Bell v. Ohio*, 438 U.S. 637 (1978), the defendant offered mitigating evidence that was consistent with the jury's guilty verdict, but demonstrated a lesser degree of culpability for the murders. The majority in this case recognized the distinction that the alibi evidence at issue here is inconsistent with defendant's convictions. *Guzek III*, 336 Or. at 461. Yet the majority found the distinction "of no consequence in

light of the Supreme Court's decision in *Green v. Georgia*, 442 U.S. 95 (1979) [(per curiam).]" *Id.*

In *Green*, this Court held that the hearsay testimony of a witness for the state in a prior, separate trial of a codefendant, regarding that codefendant's private confession that he was the actual shooter, was relevant at the sentencing phase and that its exclusion violated the Due Process Clause. The majority in this case read *Green* to hold that, "under *Lockett*, the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder." *Guzek III*, 336 Or. at 462. The majority concluded that the facts in this case "appear to be analogous" to the facts in *Green* and therefore determined that the Eighth Amendment requires the jury consider the alibi evidence in this case. *Id.*

The dissent disagreed with the majority's reliance on *Green* for three reasons, which they summarized as follows:

> First, I disagree with the conclusion that the defendant in *Green*, like defendant in this case, sought to introduce evidence that contradicted the jury's guilt-phase findings and would have led to an acquittal. Second, the citation to *Lockett* reflects nothing more than the Court's conclusion that the defendant sought to introduce evidence about his minor participation in the actual killing of the victim, which was precisely the type of evidence made relevant by both the plurality and concurring opinions in *Lockett*. Third, the circum-

> stances surrounding *Green* and its actual holding minimize its significance as a useful precedent for this case.

336 Or. at 471.

The dissent's own examination of this Court's Eighth Amendment jurisprudence led it to the opposite conclusion about whether that provision requires admission of residual-doubt evidence. The dissent relied primarily on *Franklin v. Lynaugh*, 487 U.S. 164 (1988), which the majority relegated to a footnote and distinguished by explaining that "a 'residual' or 'lingering doubt[]' remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual 'evidence' proffered during the penalty phase." *Guzek III*, 336 Or. at 463, n. 30. The dissent, while noting the narrow holding of *Franklin*, relied on the plurality's dicta and on Justice O'Connor's concurring opinion and concluded that the Eighth Amendment does not entitle a capital defendant to offer evidence of residual doubt at the sentencing phase. 336 Or. at 469, 476-77. The dissent summarized its understanding of *Franklin*:

> *Franklin* suggests that, just as residual doubt is not a constitutionally mandated mitigating factor that a jury must be allowed to consider, the Court also would hold that evidence intended to raise residual doubts about the defendant's guilt is not relevant to any constitutionally mandated mitigating factor. In other words, given that the Court has allowed states to bar residual doubt *arguments*, it appears to follow ineluctably that, consistent with the Eighth Amendment, the Court would allow

> states to exclude *evidence* that is relevant only because it would bolster those arguments—that is, evidence intended only to challenge the accuracy of the underlying guilty verdict.

Guzek III, 336 Or. at 477-78 (emphasis in original).

As discussed below, the dissent's view on this constitutional issue is consistent with the result reached in almost every other state and federal appellate court that has considered the issue. The majority holding leaves Oregon standing practically alone in concluding that the Eighth Amendment gives a capital defendant a constitutional right to offer evidence of innocence and argue residual doubt during a penalty-phase proceeding.

REASONS FOR GRANTING THE WRIT

A sharply divided Oregon Supreme Court held in this case that a capital defendant has a federal constitutional right to present evidence to a penalty-phase jury that is relevant only to show that the defendant did not commit the crime for which he has been found guilty. The holding creates a peculiar application of federal constitutional law when read in conjunction with *Franklin*. In Oregon, a capital defendant has a constitutional right to offer evidence in a penalty-phase proceeding that goes only to the issue of residual doubt or innocence, but has no constitutional right to have the jury instructed to consider that evidence. This Court's review is warranted to establish a uniform interpretation of whether the Eighth Amendment creates a constitutional right to offer evidence and argument in support of residual doubt in a penalty-phase proceeding.

I. Most state and federal courts have concluded that there is no constitutional requirement that residual-doubt evidence be admitted in a penalty-phase proceeding. The Oregon Supreme Court's contrary ruling creates a split on this important federal issue.

Very few appellate courts have concluded, as the Oregon Supreme Court did in this case, that a capital defendant has a right to offer evidence and argue the jury should consider doubt about his guilt as a relevant factor in determining the appropriate sentence. A majority of courts read *Franklin* overly broadly as deciding this issue contrary to the result reached by the Oregon court. Those courts that have recognized that the holding in *Franklin* is more limited have, like the dissent in this case, nevertheless determined that the reasoning leads to only one conclusion—residual doubt has no place in a penalty-phase proceeding because it is not relevant to the defendant's background or character or the circumstances of the offense. The few courts that have found a right to present a residual doubt argument have done so primarily on state-law grounds. Only two courts have reached the same conclusion as the Oregon Supreme Court based on the federal constitution.

a. The narrow holding in *Franklin* is that the constitution does not establish a right to a jury instruction on residual doubt.

As the dissent in this case properly noted, this Court has not resolved the precise issue presented here. In *Franklin*, four justices concluded that a defendant does not have a constitutional right to a jury instruction on residual doubt. 487 U.S. at 175 (White, J., Rehnquist, C.J., and Scalia and Kennedy, J.J.). The plurality did not reach the broader question—whether there is a constitutional right to offer evidence and argument in support of a lesser sentence mitigated by lingering doubts the jury may have about the defendant's guilt—because the defendant fully exercised this "right" if it existed. *Id.* at 174-75 ("In sum, even if petitioner had some constitutional right to seek jury consideration of 'residual doubts' about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner's proffered jury instructions did not impair this 'right.'").

Two justices concurred in the judgment. They would have addressed the question presented in this case that the *Franklin* plurality did not reach. They would have rejected the defendant's "residual doubt" claim "not because the Texas scheme allowed for consideration of 'residual doubt' by the sentencing body, but rather because the Eighth Amendment does not require it." 487 U.S. at 187 (O'Connor, J., and Blackmun, J., concurring).

The *Franklin* dissent agreed with the plurality that "in this case there was no interference with any right petitioner may have had under the Eighth Amendment to have the jury consider 'residual doubt' in making its sentencing determination." 487 U.S. at 189 (Stevens, J., and Brennan and Marshall, J.J., dissenting). The holding of the Court must therefore be read on the narrow ground that garnered majority support: a defendant does not have a constitutional right to a jury instruction on residual doubt. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (discussing binding effect of plurality opinions).

b. Most states have read *Franklin* more broadly to control the issue presented here and concluded, contrary to the Oregon Supreme Court, that there is no federal constitutional right to admit evidence in support of a residual-doubt argument.

In spite of the technically narrow scope of the Court's holding, most states have relied on *Franklin* for the broader proposition that a capital defendant not only has no constitutional right to have the jury instructed to consider residual doubt during the penalty phase, but also has no constitutional right to offer residual-doubt evidence or argument based on that evidence.[6] For example, the Florida Supreme Court has held that a defendant may not relitigate the guilt determination through the introduction of evidence suggesting lingering or residual doubt. *Duest v. State*, 855 S. 2d 33, 40 (Fla. 2003), *cert. denied sub nom Duest v. Florida*, ___ U.S. ___, 158 L. Ed 2d 500, 124 S. Ct. 2023 (2004). The evidence at issue in *Duest* was similar to that at issue in this case—alibi evidence offered to show that the defendant was not at the crime scene when the murder occurred. *Id. See also Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002), *cert.*

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[6] It is perhaps not surprising that many courts have read *Franklin* this broadly. A year after *Franklin*, this Court described the holding as follows: "a majority agreed that 'residual doub[t]' as to Franklin's guilt was not a constitutionally mandated mitigating factor." *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*citing Franklin*, 487 U.S. at 173, and n. 6 (plurality opinion); and at 187-88 (O'Connor, J., concurring in judgment)).

denied sub nom Darling v. Florida, 537 U.S. 848 (2002) (court relied on *Franklin* in holding that a defendant has no right to present evidence of lingering doubt).

The Illinois Supreme Court also has held that a defendant has no constitutional right to argue residual doubt in a penalty-phase proceeding even when, as here, a new jury is empanelled to hear the penalty phase. *People v. Emerson*, 189 Ill. 2d 436, 502-03, 727 N.E.2d 302 (2000), *cert. denied sub nom Emerson v. Illinois*, 531 U.S. 930 (2000). Like the Florida Supreme Court, the Illinois court read *Franklin* to hold broadly "that a defendant has no right to present evidence of residual doubt at the second stage of sentencing." *Id. citing Franklin*, 487 U.S. at 172-75. *See also People v. Kirchner*, 194 Ill. 2d 502, 743 N.E.2d 94 (2000), *cert. denied sub nom Kirchner v. Illinois*, 533 U.S. 955 (2001) ("the United States Supreme Court [has] held that a defendant is not entitled to present evidence of residual doubt at the penalty phase of sentencing proceedings." *Citing Franklin*, 487 U.S. at 172-75); *People v. Terrell*, 185 Ill. 2d 467, 501, 708 N.E.2d 309 (1998), *cert. denied sub nom Terrell v. Illinois*, 528 U.S. 881 (1999) ("The *Franklin* Court contemplated procedural circumstances like defendant's, where a penalty-only proceeding is held on remand, and rejected the argument that such a defendant should be allowed to present residual doubt evidence to the new sentencing jury.").

The North Carolina Supreme Court took a similar approach, viewing *Franklin* not merely as a jury instruction case, but more broadly: "Pursuant to the ruling in *Franklin*, this Court has held that residual doubt is not properly

considered as mitigating evidence in this state." *State v. Fletcher*, 354 N.C. 455, 472, 555 S.E.2d 534 (2001), *cert. denied sub nom Fletcher v. North Carolina*, 537 U.S. 846 (2002). *Fletcher* is interesting also because the North Carolina court distinguished *Green* the same way the dissent in this case did. The North Carolina court concluded that *Green* simply did not involve residual doubt. "The excluded evidence suggesting that the defendant did not personally kill the victim was consistent with the guilty verdict in *Green* * * * and would not have prompted the jury * * * to reconsider residual doubt." *Id.* at 473.

Other states have given a similarly broad reading to *Franklin*. The Delaware Supreme Court described *Franklin* as holding that the federal constitution "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt[.]" *Shelton v. State*, 744 A.2d 465, 496 (1999), *cert. denied sub nom Shelton v. Delaware*, 530 U.S. 1218 (2000) (quoting *Franklin*, 487 U.S. at 173-74). In Virginia, too, a capital defendant does not have a constitutional right to argue residual doubt in the sentencing phase. *Stockton v. Commonwealth*, 241 Va. 192, 211, 402 S.E.2d 196 (1991), *cert. denied sub nom Stockton v. Virginia*, 502 U.S. 902 (1991) (relying in part on *Franklin*). The same is true in Ohio. *State v. McGuire*, 80 Ohio St. 3d 390, 402-403, 686 N.E.2d 1112 (1997), *cert. denied sub nom McGuire v. Ohio*, 525 U.S. 831 (1998).

The Alabama Court of Criminal Appeals in *Melson v. State*, 775 So. 2d 857, 898-899 (Ala. 1999), although addressing a jury instruction question, relied on *Franklin* in

more broadly noting that "[c]apital defendants have no right to demand jury consideration of 'residual doubts' in the sentencing phase." Similarly, the Montana Supreme Court concluded that residual doubt about the defendant's guilt is not an appropriate mitigating circumstance, relying on statements in *Franklin* that "capital juries, in the sentencing phase, were not mandated to reconsider their 'residual doubts' over a defendant's guilt. Such doubts do not relate to the defendant's 'character,' 'record,' or a 'circumstance of the offense." *Gollehon v. State*, 296 Mont. 6, 13, 986 P.2d 395 (1999), *cert. denied sub nom Gollehon v. Montana*, 529 U.S. 1041 (2000).

The Texas Court of Criminal Appeals read *Franklin* as rejecting a claim that the trial court erred by preventing the jury from being able to give mitigating effect to any residual doubt about whether the defendant was guilty of the burglary during which the murder occurred. *Blue v. State*, 125 S.W.3d 491 (Tex. 2003), *cert. denied sub nom Blue v. Texas*, ___ U.S. ___, 125 S. Ct. 297, 160 L. Ed. 2d 87 (2004) (describing the *Franklin* plurality as holding that the "federal constitution does not require reconsideration by capital sentencing juries of 'residual doubts' about a defendant's guilt because such doubts do not involve a defendant's character, record or a circumstance of the offense").

c. Some states have concluded that a defendant does not have a constitutional right to raise residual doubt in the penalty phase, although the precise basis for the conclusion is unclear.

Some states have concluded that a defendant has no constitutional right to argue residual doubt, although it is

unclear whether these states view *Franklin* as controlling or merely as providing guidance. In either event, the result is the same—defendants in these states, unlike defendants in Oregon, do not have the right to present residual doubt evidence and arguement in a penalty-phase proceeding. For example, the Washington Supreme Court ruled that a defendant cannot argue residual doubt as a mitigating factor. *In re Lord*, 123 Wn. 2d 296, 868 P.2d 835 (1994), *cert. denied sub nom Lord v. Washington*, 513 U.S. 849 (1994) ("Residual doubt as to the defendant's guilt is not one of the 'relevant factors' listed in [state statute] (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor.")(citing *Franklin*). The same is true for Pennsylvania. *See, e.g., Commonwealth v. Fisher*, 572 Pa. 105, 115, 813 A.2d 761 (2002) ("a capital defendant has no constitutional right to testify to his innocence at the penalty phase of trial[.]"). Similarly, the New Jersey Supreme Court has noted that, although the Eighth Amendment requires consideration of mitigating evidence of the defendant's character or record and any of the circumstances of the offense, residual doubt concerning a defendant's guilt is not relevant to any of these considerations. *State v. Josephs*, 174 N.J. 44, 803 A.2d 1074 (2002); *see also State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987) (in a new capital sentencing proceeding, the defendant does not have a right to retry issues relevant only to guilt).

The Eleventh Circuit Court of Appeals relied on *Franklin* and concluded that "[t]he Constitution does not compel state courts to consider residual doubt." *Zeigler v. Florida*, 345 F.3d 1300 (2003), *cert. denied sub nom*

Zeigler v. Crosby, ___ U.S. ___, 125 S. Ct. 280, 160 L. Ed. 2d 67 (2004). Similarly, the Fourth Circuit Court of Appeals has commented that "'Residual doubts' at the penalty stage of a capital trial * * * are constitutionally insignificant." *Evans v. Thompson*, 881 F.2d 117, 121 (1989), *cert. denied* 497 U.S. 1010 (1990).

d. At least one court permits argument about residual doubt, but does not find a federal constitutional right to introduce evidence or have a jury instructed on the issue.

The Mississippi Supreme Court appears to have reached a result that lies somewhere between the ruling of the Oregon Supreme Court in this case and the contrary holdings discussed above. *Holland v. Mississippi*, 705 So. 2d 307 (Miss. 1997), *cert. denied* 525 U.S. 829 (1998). As in this case, *Holland* involved a capital defendant whose conviction had previously been upheld, but whose case was remanded for a new sentencing proceeding. *Id.*, 705 So. 2d at 319. In the new sentencing proceeding, the defendant sought to introduce evidence to show he was not guilty of the crimes for which his conviction had been upheld. *Id.* The Mississippi Supreme Court rejected the defendant's argument that such evidence was constitutionally required, holding instead that the "Court's prior affirmance of guilt precludes any residual or whimsical doubt as to the validity of Holland's conviction." *Id.* at 326. The court based its holding, in part, on its reading of *Franklin*, which it construed as holding "that defendants have no constitutional right to reconsideration of residual doubt on sentencing" because "such a right would be inconsistent with penalty-only tri-

als, such as resentencings, which are not themselves violative of the Eighth Amendment." *Id.* at 325-26 (citing *Franklin*, 487 U.S. at 173 n. 6 and 174). The court made a distinction between residual-doubt argument, which it permits, and "the submission of jury instruction or evidence on residual doubt" which it deemed impermissible. *Holland*, 705 So. 2d at 326. Because the evidence the defendant offered, as in this case, was "nothing more than an attack upon the prior finding of guilty by the first jury, which was affirmed by this [c]ourt," the Mississippi Supreme Court concluded that the defendant was not entitled to present evidence or have a jury instruction on residual doubt. *Id.* at 327.

e. Some states have found a state-law basis for a residual-doubt claim.

States concluding that a defendant has a right to argue residual doubt in the penalty phase have generally based that conclusion on state law, not on the federal constitution. For example, the California Supreme Court, while recognizing no federal or state law right to a jury instruction on residual doubt, found a state statutory right to present evidence and argue residual doubt. *People v. Musselwhite*, 17 Cal. 4th 1216, 1272-73, 74 Cal. Rptr. 2d 212, 247 (1998), *cert. denied sub nom Musselwhite v. California*, 525 U.S. 1073 (1999). The Tennessee Supreme Court similarly found a state law right for a defendant to present evidence at a resentencing hearing to establish residual doubt. *State v. Holton*, 126 S.W.3d 845, 861 (2004), *cert. denied sub nom Holton v. Tennessee*, ___ U.S. ___, 125 S. Ct. 62, 160 L. Ed. 2d 22 (2004) (under Tennessee law, a defendant has the right to present at the sentencing hearing evidence which may mitigate his culpability); *see also State v. Hartman*, 42 S.W.3d 44, 55 (Tenn. 2001).[7]

The Supreme Court of Georgia has construed state statutes as giving considerable leeway to defendants to present mitigating evidence in a penalty-phase proceeding. *Height v. State*, ___ Ga. ___, ___ S.E.2d ___, 2004 Ga. LEXIS 958 (Nov 8, 2004). In an earlier ruling, the court noted that *Lockett* and *Eddings* give "[c]onstitutional tenure" to its holding that the state statute permits consideration in sentencing of guilt or innocence. *Blankenship v. State*, 251 Ga. 621, 624, 308 S.E.2d 369 (1983). *See also Romine v. State*, 256 Ga. 521, 350 S.E.2d 446 (1986), *cert. denied sub nom Romine v. Georgia*, 481 U.S. 1024 (1987) ("evidence relating to guilt or innocence is relevant to sentence" and is especially important where the case is being retried only in a new penalty phase).

f. Only two courts appear to have reached a result similar to that of the Oregon Supreme Court.

The only state court other than Oregon to have found a federal constitutional right to submit evidence and argue residual doubt in a sentencing proceeding did so

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[7] Like many of the other states, the Tennessee Supreme Court reads *Franklin* broadly. *See Hartman*, 42 S.W.3d at 55 ("The United States Supreme Court has held that there is no constitutional right to have residual doubt considered as a mitigating factor in a capital sentencing hearing.") (citing *Franklin*, 487 U.S. at 174).

prior to the issuance of *Franklin*. In 1986, the South Carolina Supreme Court determined, relying on *Eddings* and *Lockett*, that the Eighth Amendment requires a defendant be permitted to introduce evidence of innocence in a penalty-phase proceeding. *State v. Stewart*, 288 S.C. 232, 341 S.E.2d 789 (1986). The court called that holding into question in *dicta* in *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied sub nom Southerland v. South Carolina*, 513 U.S. 1166 (1995), *overruled on other grounds, State v. Chapman*, 317 S.C. 302, 454 S.E 2d 317 (1995) (although the trial court denied defense counsel's request to argue residual doubt, counsel without objection nevertheless made the argument; but the court notes that "residual doubts are not a mitigating factor in sentencing," citing *Franklin*).

If the South Carolina Supreme Court has, in fact, reached the conclusion that there is no federal constitutional right to argue residual doubt, only the Fifth Circuit Court of Appeals is in agreement with the Oregon Supreme Court on this issue. The Fifth Circuit concluded that there is a constitutional right to present evidence and argument in support of residual doubt, even if there is no right to a jury instruction. *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), *cert. granted and judgment vacated on other grounds*, 503 U.S. 930 (1992).

II. The Oregon Supreme Court's decision provides the Court with an opportunity to clarify whether, under the Eighth Amendment, residual-doubt evidence must be admitted in penalty-phase proceedings.

In this case, a majority of the Oregon Supreme Court read this Court's Eighth Amendment case law to require that a capital defendant must be permitted to offer, in a new penalty-phase proceeding, alibi evidence that casts doubt on his guilt. As the dissent below properly noted, this result is inconsistent with the analysis that led this Court to conclude in *Franklin* that a defendant does not have a constitutional right to a jury instruction on residual doubt. Although they have not always been clear on the scope of the *Franklin* holding, most other courts that have addressed this issue have reached the same conclusion as the dissent in this case.

This case thus presents the Court with the opportunity to clarify a question that now divides the courts. It is important to resolve this conflict so that the Eighth Amendment is not construed to provide different constitutional rights to capital defendants depending on where they reside. The Oregon Supreme Court's ruling opens the door to relitigation of defendant's guilt in the penalty-phase proceeding. If the jury finds defendant's alibi evidence persuasive, it creates more than simply residual doubt as a mitigating factor to consider in choosing the appropriate sentence, but may call into question the validity of the conviction itself. As the Ohio Supreme Court stated,

> Our system requires that the prosecution prove all elements of a crime beyond a reasonable doubt. Therefore, it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred. * * * Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial.

McGuire, 80 Ohio St. at 403 (citation omitted). The states have a strong interest in finality of criminal convictions as well as an interest in reducing the significant costs that may be associated with relitigating questions of guilt and innocence in a penalty-phase proceeding.

In addition, as this Court noted in *Franklin*, finding a constitutional right to raise residual doubt before the penalty-phase jury "is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal." *Franklin*, 487 U.S. at 173 n. 6 (plurality opinion). Yet this Court itself has suggested the limited remand for a new penalty-phase proceeding only and state courts frequently allow this kind of remand. The Oregon Supreme Court's holding casts some doubt on the permissibility of these stand-alone penalty-phase proceedings.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for writ of

certiorari and reverse the decision of the Oregon Supreme Court below.

Respectfully submitted,

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